

BETWEEN ‘LAND GRABS’ AND AGRICULTURAL INVESTMENT:

LAND RENT CONTRACTS WITH FOREIGN INVESTORS AND ETHIOPIA’S NORMATIVE SETTING IN FOCUS

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Abstract

This article examines whether the land rent contracts and the Ethiopian legal framework on rural land use rights can assure win-win mutual benefits expected from large-scale land transfers to foreign investors. The article further examines the challenges in the realization of the *Seven Principles* for Responsible Agricultural Investments prepared by FAO, IFAD, UNCTAD and the World Bank Group as a framework of standards for the current global dialogue on large-scale farmland acquisitions. I argue that land-use insecurity in the Ethiopian context results from the extensive powers of executive offices that are empowered to dispossess holders and reallocate land to investors. These powers can be even more discretionary where land transfers are made without prior mapping and demarcation of protected forests and wildlife, and where registration and the issuance of land-holding certificates to smallholder farmers and pastoralists have not yet been made. The article suggests the need to rectify the gaps in the land transfer contracts and most importantly, the need to render the government a *custodian* (and not *owner*) of land in conformity with the FDRE Constitution and to ensure that the termination of land use rights is decided by courts so that executive offices would not perform the dual functions of revoking and reallocating rural land use rights.

Key words:

Land grabs, responsible agricultural investment, land rights, farmland acquisition, Ethiopia

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Introduction

Green revolutions that depend on unsustainable intensive agri-business rather than broad based modernization of sustainable agriculture usually show an initial period of boom in production. This is followed by an interim period of stagnation and then the ultimate tragedy of a steady rise in fertilizer needs per

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hectare at a magnitude that is greater than the rise in agricultural production. Project documents are usually optimistic and laden with a long menu of promises. Unfortunately, however, many elements factor in as the agricultural investment projects unfold towards production and marketing. The downsides of unsustainable green revolutions and large scale agricultural activities include the *pesticide treadmill* as pests become resistant to pesticides. This leads to the continuous spiral challenges of using stronger pesticide. Meanwhile, the pests that survive pass on their genes (that are resistant to a particular pesticide) to their offspring. In the process, organisms that are useful are killed to the detriment of the fertility of the soil.

Normative and institutional factors can indeed reduce the environmental and health risks involved in green revolutions and can also enhance their economic benefits. That is why large-scale modern farming is required to balance economic returns with social responsibility and environmental sustainability. This can indeed rectify the downsides that are inherent in hasty large-scale agri-business. In due course, such responsible agricultural investments (which can be small-scale, medium or large) have the potential to gradually bring about relief to a significant portion of Ethiopia's highly fragmented subsistence farms and overgrazed lands. This process, *inter alia*, further envisages agro-ecological technology with a view to gradually encourage smallholder farming towards consolidation rather than fragmentation.

Modern farming in Ethiopia had initially blossomed in the 1960s and early 1970s during which professionals in agriculture and other entrepreneurs joined hands and started a significant number of small-scale and medium sized modern farms. This was followed by the experience of post-1975, during which state-owned farms were largely unsuccessful. Ethiopia's experience to date and the lessons gained from other green revolutions thus necessitate the examination of Ethiopia's normative setting as an institutional tool in regulating large-scale farming towards responsible agriculture. Moreover, the contracts concluded with foreign investors in large-scale farms in Ethiopia need to be assessed in light of the elements of responsible agricultural investment.

Massive farmland acquisitions in Ethiopia involve multinational enterprises (MNEs) from India and other countries. As indicated in the various sections of this article, the farmland acquisitions primarily aim at agricultural production for their home markets. The identity of the companies, the amount of land allocation, the benefits of agricultural investments, the need to distinguish agricultural investment from land grabs and the risks in large-scale farmland transfers have attracted discourse among academics, researchers, policy makers and activist critics. The article touches upon these issues in the course of addressing its core themes. It discusses the rural land use rights regime in Ethiopia that has made farmland susceptible to extensive acquisition by foreign MNEs. It also briefly examines some contractual provisions in light of the need

for the embodiment of the potential benefits and promises into binding obligations.

The first section highlights the magnitude of large-scale farmland acquisition in Ethiopia based on recent research. Section 2 presents official statements in support of the land transfers and critical views thereof. The third section examines the challenges in relation to the Ethiopian land law regime and their impact in the implementation of the *Seven Principles* for Responsible Agricultural Investment¹ that are recommended by FAO, IFAD and UNCTAD. Sections 4 to 7 deal with the core features of fairly negotiated contracts, the profile of twenty-four land rent contracts concluded by the Ministry of Agriculture and Rural Development (currently Ministry of Agriculture), and the problems and gaps in the contracts. Finally, the conclusion, *inter alia*, highlights the need for checks and balances in the adjudicative and executive functions of the State in relation with land use rights. It further reflects upon the factors for and the adverse impacts of rising consumerism and FDI-centered statistical 'growth' that misinform the notion of 'development' pursuits.

1. The Magnitude of Large-scale Land Acquisition in Ethiopia

1.1- Land available for allocation

The area of land that can be allocated for agricultural investment projects was (in 2008) stated as 10 million hectares.² In 2009 and 2010, lesser figures between 3 to 3.5 million hectares were stated by "senior officials of [the Ministry of Agriculture and Rural Development (MoARD)]", currently Ministry of Agriculture (MoA), and the figure was at times stated as 5 million hectares."³ At present, land lease of 5000 hectares (or above) can only be done at the federal level by the Ministry of Agriculture (MoA).

¹ FAO, IFAD, UNCTAD and the World Bank Group, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, A discussion note prepared to contribute to an ongoing global dialogue. January 25, 2010

² "(MoARD, 2008). This and other documents, available in <www.moard.gov.et> in 2009 and mid-2010, have since been removed." [in Dessalegn Rahmato *infra* note 3,

p. 10]

³ Dessalegn Rahmato (2011), *Land to Investors: Large-Scale Land Transfers in Ethiopia* (FSS Policy Debates Series), June 2011, p. 10

Dessalegn states that ambitious figures were also stated in "the Ministry of Mines and Energy's (MME)'s bio-fuel strategy document" which assumes the availability of "24 million hectares of unutilized land suitable for growing bioethanol and bio-diesel crops" The document states that leasing out these lands will not interfere with the production of food crops and [does] not jeopardize the country's plans for food security."

The Ministry has established the Agricultural Investment Support Directorate which is in charge of administering the allocation of land above 5000 hectares for investment purposes. Imeru Tamrat notes two issues in this regard. His first observation is that although the Federal Constitution allows the federal government to delegate “the mandates given to it under the Constitution to regional states,” no specific provision in the Constitution “specifically provides for upward delegation of the mandates given to the regional states.” He thus notes that “the current upward delegation by regional states of their mandates to administer land to the federal government stands on a shaky constitutional basis.”⁴ Imeru’s second point relates to the need to clarify “the relative responsibilities of the concerned federal and regional agencies” in the allocation, follow-up and monitoring of the investments.⁵

One can argue that Article 51 (1) of the Federal Constitution entrusts the federal government with the task of enacting laws “for the utilization and conservation of land”, and that Article 52(2)(d) merely gives regional states the powers and functions “to administer land and other natural resources in accordance with Federal laws.” The issue that can be raised is whether allocation of extensive areas of land (e.g. 300,000 hectares) can be regarded an “administrative” function. According to this line of argument, the federal government is clearly entrusted with wider powers regarding land (including enacting laws for its utilization and conservation) thereby rendering its power to allocate land constitutional, while the powers of regional states is confined to the function of administering “land and other natural resources in accordance with Federal laws.” The easier option for the federal government could thus have been enacting laws regarding the allocation of land beyond a certain threshold rather than resorting to an upward delegation.

It is to be noted that the mere decentralization of the power to allocate land to regional entities does not guarantee appropriate land allocation for agricultural investment and does not necessarily control land grabs. For example, the land acquisition of Karuturi in Gambella was 300,000 hectares (at a lease rate of Birr. 20, i.e. USD 1.16 per hectare at the average exchange rate for the months of November and December 2011) in the land deal made with the regional offices while the revised contract concluded at the federal level has reduced the area to 100,000 hectares as highlighted in Section 4, a figure which still shows massive land transfer. The following amount of land has been reported by the regional states as land that is available since 2009.

⁴ Article 50(9), Constitution of the Federal Democratic Republic of Ethiopia.

⁵ Imeru Tamrat (2010), “Governance of Large Scale Agricultural Investments in Africa”, (Paper presented at World Bank Conference on Land Policy and Administration, Washington DC, April 26-27 2010), p. 9.

Investment Land under Federal Land Bank⁶

Regions	Land in Hectares
Amhara	420,000 (not yet confirmed)
Afar	409,678
BeniShangul	691,984
Gambella	829,199
Oromia	1,057,866
SNNP	180,625
Total	3,589,678

Source: [The following sources are stated in D. Rahmato]:

- MoARD (2009), Planned System for Administration of Investment Land [Amharic]. Addis Ababa, June, 2009. MoARD (2010), General Brochure [sic]. Addis Ababa, March <www.moard.gov.et>. Interviews made by Dessalegn Rahmato with Oromia land and environment bureau⁷

In a statement issued by the Ministry of Foreign Affairs (in January 2010), the area of land that can be made available for investors is more than 7 million acres [i.e. about 3 million hectares]. It states that the Agricultural Investment Support Directorate “has identified more than 7 million acres available now for lease. ... Ethiopia has 74 million hectares of land suitable for agriculture out of its total 115 million hectares, but less than 15 million hectares is currently in use agriculturally.”⁸ It is to be noted that this figure of 74 million hectares constitutes about 64% of Ethiopia’s total land.

⁶ Table 1, D. Rahmato, *supra* note 3, p. 11.

⁷ *Ibid.*

“The new five-year Growth and Transformation Plan (GTP), which is to run from 2011 to 2015, and which was launched in the last quarter of 2010, envisages agriculture to grow at the rate of 14.9 % annually, and expects to double farm output by the year 2015. The Plan predicts that the country will meet all the MDG targets in 2015, and by 2028 Ethiopia will become what it calls a “middle income” country. One of the strategies for rapid agricultural growth is to be private investment in large scale farms for which the government will provide support and encouragement. The land expected to be transferred to large-scale investors in the Plan period (not including land already allotted) is expected to increase from 0.5 million hectares in 2011, to 2.8 million in 2013 and 3.3 million in 2015 (see MOFED 2010 a,c).” [*Ibid*]

⁸ FDRE Ministry of Foreign Affairs, “Politically motivated opposition to agricultural investment” *A Week in the Horn*, 22 January 2010.
<http://www.mfa.gov.et/Press_Section/Week_Horn_Africa_January_22_2010.htm#4>
Last visited: 5 August 2011.

1.2- Land transferred to investors

According to the World Bank (2010), “the total land transferred to investors in Ethiopia between 2004 and 2008 [is] 1.2 million hectares.”⁹ The Growth and Transformation Plan (GTP) for the years 2011-2015 envisages that “by the end of the GTP period in 2015, the total land transferred to investors will measure nearly 7 million hectares.”¹⁰ Dessalegn Rahmato’s study states his findings from field visits, MoARD, MELCA Mahiber 2008, and local press reports. Annexes 1 and 2 of his study indicate that 28 large-scale land transfers (670,000 hectares) are made in the various regions other than the transfer made in Gambella, and there are 15 large-scale land transfers (535,000 hectares) in the Gambella Regional State. This only provides a “partial list of some of the larger land acquisitions” and shows only large-scale land allocations of 2000 hectares or more. “In terms of absolute numbers, small-scale land transfers, i.e. lands measuring below 5000 hectares are much more numerous.”¹¹

The study shows a total large-scale land transfer of (670,000 + 535,000 =) 1,205,000 hectares. Out of the 1,205,000 hectares of land, 49,000 hectares are domestic investments while the remaining 1,156,000 hectares which constitutes about 96 percent of the large-scale farms (i.e. farms with 2000 hectares or more) are allocated to foreign investors. It is also to be noted that Indian investors have acquired 700,000 hectares out of the 1,156,000 hectares thereby constituting about 61 percent of the total land allocated to the foreign investors stated in the tables.

2- The Discourse on the Merits of and Challenges in Land Transfers: An Overview

Official statements have been given in support of the large-scale farmland allocations to which there are criticisms mainly from activists (on environmental protection and human rights), academics and researchers. The issues of concern, *inter alia*, include the impact of such allocations on food security, water resources and the well-being of smallholder farmers and pastoralists. On the positive front, it is expected to have benefits such as enhancing job opportunities, economic development, public revenue and technological spillovers.¹²

⁹ D. Rahmato, *supra* note 3, p. 12.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² The issues of concern in the overall discourse of land transfers include the following:

- The prime target of the investors: exports *versus* local market;
- Whether it has a positive impact on food security in Ethiopia;

2.1- Official statements

Ethiopia's Ambassador to the UK¹³ expresses Ethiopia's prime concerns in "ensuring food self-sufficiency at both national and household levels" and he believes that the first concern i.e. food security at the national level "has already been attained" and that current efforts target at the second concern, namely food security at the household level. To this end, he states the need to "develop large mechanised agriculture to increase food production and enable the agricultural sector the crucial role it is expected to play in the implementation of our five-year Growth and Transformation Plan." With regard to safeguards, he notes that "commercial farming is supplementary to farming by small-holders" and "[environmental impact studies are carried out by [the] Environmental Protection Authority."

Moreover, the Ambassador states that the "land allocated is not currently under cultivation by small-scale farmers and has, until now, been inaccessible for agricultural use, especially in the lowland areas." Expected benefits include "new social and physical infrastructure", the sale of "some of their production in Ethiopia, helping to close the food shortage gap, and exporting the rest", the creation of job opportunities, knowledge transfer, tax revenue, market access and other benefits.

The Ministry of Foreign Affairs¹⁴ considers the criticisms against the land transfers as politically motivated. It states that "[t]he current wave of agricultural investment began a year or two ago as international food prices

- The issue of increased need for water resources;
- The issue of the rights of farmers and herders;
- Land rights of displaced smallholder farmers and herders;
- The revenue to be obtained: taxes, lease revenue, export earnings;
- The magnitude of the positive impact in enhancing economic growth, employment opportunities, technology transfer;
- Impact on communities, farmers, herders;
- Impact on the environment;
- concerns regarding the lease rate per hectare;
- Whether the contracts are well-negotiated in a win-win context;
- The misconception of considering forests, community grazing lands and wetlands and land that is not under cultivation as 'unused', 'idle' and 'unoccupied'.

¹³ Berhanu Kebede, Ethiopia's ambassador to the UK, *The Guardian*, 4 April, 2010.

¹⁴ FDRE Ministry of Foreign Affairs, "Politically motivated opposition to agricultural investment" *A Week in the Horn*, 22 January 2010.

<http://www.mfa.gov.et/Press_Section/Week_Horn_Africa_January_22_2010.htm#4>

began to rise sharply, particularly in 2008” and that “[i]nstead of buying expensive food on the world market” foreign investors opted to “lease unused land abroad and grow the food there to provide their own food security.” The Ministry is optimistic that this provides “new seeds and new techniques” to developing countries and that the “deals also allow for major overall investment, including improved marketing as well as better jobs, and related infrastructural developments, including schools, clinics and roads.” The statement underlines that “some of the deals will cover land that has not been used before”, and points out that “there has been much less criticism about foreign investments made in agriculture in Russia or Ukraine”... “ or in South East Asia or even in Brazil, all of which have also been targeted by external agricultural investors.” The statement further makes a distinction between land “that is being given away” and land that is being leased because “the investment will remain when the lease [ends].” The statement cites FAO’s Representative in Ethiopia, Mafa Chipeta, who says ‘If these deals are negotiated well, it will change the dynamics of the food economy in this country’.”

BBC news cites Ethiopia’s Deputy Prime Minister¹⁵ as having said that most of the land is not currently being used effectively and this foreign investment will benefit local communities. The statement includes the payment of compensation “to people living on the land they plan to acquire” and the benefits that include employment opportunities and the enhancement of “more efficient and productive farming processes.” The statement indicates that the amount being sold is only 3% of the total arable area and it “is lowland where farmers are not willing to go and plough” as it is “often infested with malaria and the climate makes it unsuitable for small holder farmers.”

2.2- Critical views on the land transfers

Various civil societies, researchers, academics and environmental and human rights activists have expressed their concerns regarding the adverse impact of large-scale farmland acquisitions by foreign investors that primarily target at the food and energy security of their home markets. Fikre Tolossa¹⁶ states that “these fertile lands will lose their trees, topsoil, natural habitats and rivers, to be rendered barren as a result of exposition to chemicals latent in the fertilizers, insecticides and pesticides” and that the rivers and lakes that survive “are likely to be poisoned by toxic materials and become undrinkable and health hazard.” He argues that government “should protect its national reserve bearing in mind future generations” and that lands that are not utilized at present will inevitably

¹⁵ 10 June 2011, <<http://www.bbc.co.uk/news/business-13725431>>

¹⁶ A speech delivered at the Commonwealth Club of California on March 1, 2011, <<http://nazret.com/blog/index.php/2011/03/03/land-grab-in-africa-the-case-of-ethiopia?blog=15>> (Accessed: 18 March 2011).

be used “due to population explosion and scarcity of arable lands.” He further raises the question as to why native farmers are dislocated if the allocations are made on unused lands.

Oakland Institute’s report titled “*Understanding Land Investment Deals in Africa, Country Report: Ethiopia*”¹¹ states the benefits of the large-scale farmland investments and also addresses their impact on food security, socioeconomic and cultural impacts, the impact of dispossession and displacement, environmental impacts, and water use and water management. It further discusses the issue whether land certification makes any difference.^{11 ***** 18}

with regard to *transfer of technology*, the Oakland Institute Report underlines that the current realities are not yet promising and “it is too early to tell if these advantages will accrue to Ethiopia.” According to the report, effective strategies should be developed “for enabling such technology transfer.”¹⁹ The report appreciates the efforts of the Ethiopian government in *infrastructure development* and it states the likelihood that investors can enhance this development “through various partnership schemes, or as part of wider country-to-country development assistance efforts”.²⁰ However, the report forwards the caveat that “it remains to be seen”²¹ whether investors will contribute to infrastructure commensurate with their potential and promises.

The positive contribution of these investments in *job creation* is stated in the report along with the problem of low wages that is likely to arise particularly during the initial stages unless the Ethiopian government addresses its “failure to improve minimum labor and pay standards.”²² The report critically states the gap between pledged and actually realized *capital investments*, and observes that as a result, “capital expenditure quoted by Ethiopian federal departments are misleading”. It further notes that “using the widely-accepted uNcTAD methods

¹¹ Felix Horne (2011), “Understanding Land Investment Deals in Africa, Country Report: Ethiopia”, *the Oakland Institute*.

¹⁸ The report, *inter alia*, provides data such as the one attached as Appendix III. As stated in Appendix B of the Report, “the figures stated under *Federal* and *Multiregional* are numbers provided by the federal government (200,000 ha)” which might overlap with region-specific numbers. “In addition, multi-regional figures (500,020 ha) may include land investments that are also included in the federal figure (200,000 ha).”¹⁸ Nevertheless the figures indicate the overall magnitude of the land allocation despite inconsistencies in data that are available from various sources.

¹⁹ *Ibid.* p. 34

²⁰ *Ibid.*, p. 35

²¹ *Ibid.*

²² *Ibid.*

shows a steady decrease in FDI since 2006, as UNCTAD's numbers do not include pre-implementation investments".²³

The Oakland Institute Report further points out various adverse impacts of the large-scale land acquisitions in the realms of food security.²⁴ Other impacts include socioeconomic and cultural impacts such as the risk of increased conflicts (as a result of population growth accompanied by dwindling farmland for smallholder farmers and herders), loss of cultural identity, the need to enforce mandatory standards in labour conditions, and loss of livelihoods upon displacement. The report further discusses the impact of dispossession and displacement and the adverse potential impact of the projects on the environment. It also deals with the issues of water resource management and land registration.²⁵

Dessalegn Rahmato²⁶ notes three perspectives in the current land grab debate. The *first* category includes the "more polemical version" which "speaks of a new form of agricultural neo-colonialism, and accuses the international financial institutions of promoting aggressive land grabs in poor countries through support to investors and host governments."²⁷ The *second* 'liberal and pragmatic' opinion, adopted by FAO and others "sees immense dangers in the global rush for land" and it "recognizes that there are considerable opportunities that could benefit host governments and their populations" through "responsible decision-making and equally responsible investment" which can minimize "the costs and damages assumed to be inherent in land grabbing" thereby "leading to a situation where both host countries and investors could benefit in equal measure."²⁸

The *third* approach is pursued by Borras and Franco (2010) and others who "are critical of the liberal approach and contend that the debate should examine what they call the political dynamics of land property relations and changes in these relations, and give particular attention to class analysis."²⁹ This perspective "looks at the structural changes that large-scale land transfers will

²³ *Ibid.*

²⁴ *Ibid.*, pp. 35-37.

²⁵ *Ibid.*, pp. 36-447.

²⁶ D. Rahmato, *supra* note 3.

²⁷ *Ibid.*, p. 3. Footnote 4 classifies Oakland Institute and GRAIN into this category and it reads as follows: See article by the Oakland Institute and GRAIN: www.oaklandinstitute.org, www.grain.org Short pieces on agricultural neo-colonialism have appeared on GRAIN web pages. A recent international conference on land grabbing held in the Netherlands was titled "Africa for Sale".

²⁸ *Ibid.*

²⁹ *Ibid.* pp. 3,4

bring about in host countries, especially in the agricultural sector and the direction these changes will take in terms of class divisions and social polarization.” They argue that the global land grab will lead to “changes in land property relations favoring the (re)concentration of wealth and power” and thus give “rise to the dispossession and displacement of smallholders, indigenous peoples and the poor in general.”³⁰

Against this backdrop Dessalegn Rahmato aims at drawing attention to what he considers “a gap in the debate”:

[s]ufficient attention has not been given to the issue of land rights of communities and the state-power dynamics that are intertwined with such rights in host countries. In some cases, the urge for greater state power centralization appears to have been the driving force for the commercialization of land and the open door policy African governments have extended to investment capital, both domestic and foreign. From this perspective the global land grab will have had the effect of enhancing the dominance of the state at the expense of citizens and grassroots communities.³¹

Dessalegn³² further recalls the benefits that are frequently mentioned in the documents of the Ministry of Agriculture. They include enhanced foreign earnings, “production of crops needed for agro-industry such as cotton and sugar cane”, employment opportunities, infrastructure, technology transfer, and enhanced energy security. ” He observes that “[s]o far there is no evidence that many of these objectives have been met” while on the contrary, the evidence gathered during his study “indicates that the damage done at present by the projects outweighs the benefits gained.”³³

3- The Legal Framework and Challenges in the Realization of Responsible Agricultural Investment (RAI)

There is no disagreement on the factors that caused the global rush for extensive land acquisition in various African countries including Ethiopia. As Cotula states, “the food price hikes of 2008 and the biofuels boom are key drivers, but other factors are also at play - such as business opportunities linked to expectations of rising food prices, agricultural commodity demand for industry, and policy reforms in recipient countries.”³⁴ The interest of foreign investors is ^{30 31 32 33 34}

³⁰ *Ibid*, p. 4

³¹ *Ibid*, p. 4

³² Ethiopians use first names even in formal communication.

³³ D. Rahmato, *supra* note 3, p. 13

³⁴ Lorenzo Cotula (2009), “Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment”, *FDI Perspectives*, No. 8, June 22, 2009.

thus obvious. Moreover, host countries are attracted by the potential opportunities, which need to be balanced with the economic, social and environmental risks involved. One of the risks relates to the inadequate mechanisms in the legal regime “to protect local rights and take account of local interests, livelihoods and welfare.”³⁵

3.1- The vulnerability of insecure individual leaseholds and undemarcated state holdings

Gaps in legal regimes include “[i]nsecure resource rights, inaccessible registration procedures, compensation limited to loss of improvements like crops and trees, and legislative gaps often undermine the position of local people.”³⁶ Imeru observes the problems with regard to the normative and implementation framework of land registration in Ethiopia:

To date... only four regional states constituting around 70% of the rural population of the country, namely, the Amhara, Oromia, Tigray and Southern Nations, Nationalities and Peoples (SNNP) regional states have issued implementation legislation and proceeded with issuing land holding certificates to peasant households formally giving recognition to the rights provided for under the Constitution. ... In the absence of detailed land administration laws in the other five regional states, it is not clear how the land holding rights given to peasants and pastoralists under the Constitution is being implemented within these regional states.³⁷

imeru notes the problems that can be encountered by pastoralist communities predominantly residing in the regions which have not yet enacted implementation legislation and that have not started issuing landholding certificates.³⁸ These communities “constitute around 12 per cent of the total population of the country (or around 15 percent of the rural population”.³⁹ Moreover, he indicates the gaps in the mapping and demarcating of protected forests and wildlife:⁴⁰

Some protected forests and national parks have already been designated and demarcated by law^{35 36 37 38 39 40 41} but other major state forests and national parks such as the Bale Mountains, Gambella, Nechisar and Yangudi Rassa have yet to be

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ I. Tamrat, *supra* note 5, pp. 5-6

³⁸ *Ibid.* p. 6

³⁹ *Ibid.*

⁴⁰ *Ibid.*, pp. 7-8.

⁴¹ E.g. Awash, Semien Mountains, Omo and Mago national parks.

designated and demarcated by law.⁴² To date, there is a lack of a comprehensive formal initiative to demarcate state owned forest lands and the mapping, designation and formal registration of such rights is absent. The lack of mapping and registration of rights over state forests has reportedly resulted in drastically reduced size of state forests and wildlife areas due to encroachment by local communities living around the area. Similarly, the on-going land registration in the regions which have started the exercise have not yet included the survey and mapping of forest lands, although there are some on-going efforts in this direction recently.⁴³

3.2- The vulnerability of customary landholdings

Leasehold systems in different African countries have been found to be less vulnerable to land grabs as compared to customary holdings. In countries where there is clarity as to the scope of rural land use rights and, most important, where independent courts are the only organs that determine the termination of land use rights, leaseholds are not substantially inferior to private ownership with regard to the security and tenure against eviction. In fact, private ownership can also be exposed to arbitrary expropriation in the absence of effective judicial protection.

In African legal regimes where the predominant landholding system is legally recognized customary landholding without clear modalities of title deeds and land transfer procedures, extensive areas of land can be susceptible to grabs as a result of deals of MNEs with traditional chiefs. A case in point is the experience in Kusawgu, Northern Ghana where a biofuel company had managed to grab 38,000 hectares of forestland by convincing a local chief.⁴⁴ The community later realized that “the promised jobs and incomes were unlikely to materialize” and that “the plantation would mean extensive deforestation and the loss of incomes from gathering forest products, such as sheanuts.” Eventually, the community terminated the contract “but not before 2,600 hectares of land had been deforested.”⁴⁵ Such grabs and community disempowerment occur through a promise of “a ‘better future’ under the guise of jobs, with the argument that they are currently only just surviving from the ‘unproductive

⁴² The Food and Agricultural Organization: Global Forest Resources Assessment, 2005.

⁴³ I. Tamrat, *supra* note 5. *Footnote 16* reads: “Interviews made with land administration experts in Amhara, Oromia, SNNP and Benishangul-Gumuz regional states.”

⁴⁴ Bakari Nyari, in Matondi and Mutopo (2011), “Attracting foreign investment in Africa in the context of land grabbing for biofuels and food security”, *Biofues, Land Grabbing and Food Security in Africa*, Matondi *et al*, Editors (London/New York: Zed Books), p. 84.

⁴⁵ *Ibid*.

land' and that they stand to earn a regular income if they give up the land for development."⁴⁶

This argument fails to appreciate African view of the meaning of land to the community. While initial temptation to give up the land to earn a wage is great, it portends an ominous future, where the community's sovereignty, identity and sense of self is lost because of the fragmentation that it will suffer.⁴⁷

Under such settings, members of a community cannot be regarded as secure because the normative and traditional framework renders their land vulnerable to grabbing. The methods used by MNEs in these situations is to capture "[t]he imagination of a few influential leaders in the community" who are then "told of the prospects for the community held out by the project, and are swayed with promises of positions in the company or monetary inducements."⁴⁸

3.3- The need for agricultural investment and the caution against land grabs

Continued subsistence farming in Ethiopia's current context apparently leads to graver poverty and farmland fragmentation unless it eventually evolves onto modern farming which enables a smaller percentage of the population to produce beyond subsistence by mainly targeting at local food supply. Distinction should thus be made between agricultural investment and massive land acquisition by foreign investors for their home market. It is also to be noted that hasty steps towards large-scale mechanized agriculture in topographic settings where there is much dependence on rhythmic seasonal rainfall rather than surface freshwaters suitable for irrigation cannot bring about the success obtained in agricultural modernization in settings where surface freshwater resources are abundant and where the watershed in the basin is well-managed.

Caution and prudence are thus crucial. If, for example, land is allocated to an investor who undertakes an agricultural activity, the farm may incrementally increase the area of cultivation that can gradually enhance commercial farming by incorporating adjacent small-holders through win-win schemes. The schemes may be shareholding plus job options to smallholder farmers or introducing contract farming in which the modern farm can provide mechanized farming services in neighbouring farms for consideration (in the forms of payment or sharecropping), and/or outsource certain farming activities to be done by smallholder farmers. There are lessons that can be learnt from the success, efficiency and dynamism of modern farms that were emerging during the late

⁴⁶ *Ibid*, p. 85.

⁴⁷ *Ibid*.

⁴⁸

1960s and the early 1970s, vis-a-vis the poor performance of the same farms after their post-1975 nationalization. One of the core lessons to be drawn is the advantage in modest takeoffs and incremental scaling up in the context of integration with the local communities in which commercial farming takes place.

In contrast to win-win agricultural investments, land grabs target at short-term benefits. They are indifferent to local needs and seek massive land acquisitions. Cotula underlines the need for enhancing efforts “to secure local land rights, including customary rights, using collective land registration where appropriate” and he further notes the necessity of ensuring “free, prior and informed consent, robust compensation regimes, the provision of legal aid, and good governance in land tenure and administration.” In the absence of such rights, land transfers run the risk of abuse under discretionary decisions by various regulatory offices thereby leaving the doors wide to speculative land acquisitions, displacement and environmental harm.

The “*Declaration on land issues and challenges in Africa*” adopted in July 2009 by the Heads of State of the African Union (AU) stresses “the urgency of building a solid institutional framework for investment in agriculture” and also states the need for “strong systems of land governance that recognize the diversity and complexity of the systems under which land and related resources are held, managed and used.”⁴⁹ In particular, the *Seven Principles of Responsible Agricultural Investments* (RAI Principles) prepared by FAO, IFAD, UNCTAD and the World Bank Group (January 25, 2010) are meant to serve as a framework of standards for the current global dialogue on large-scale farmland acquisitions. However, the principles are embodied as a discussion note and are meant to be voluntarily ascribed to in fair farmland deals and project implementation. This presupposes a legal regime and an institutional framework which can facilitate the implementation of the thresholds embodied in the principles.

3.4- First Principle: The recognition and respect for existing land and resource rights

The realization of the *first principle* presupposes secure land rights in favour of smallholder farmers, herders, and communities. The first principle thus becomes ineffective without the prior existence of secure land and resource rights. Article 40(3) of the FDRE Constitution provides that “The right to ownership of rural and urban land, as well as natural resources is exclusively vested in the state and in the peoples of Ethiopia.” It further stipulates that “Land is a common

⁴⁹ OECD, Freedom of Investment Process, Responsible Investment in Agriculture, May 2010, p. 9.

property of the Nations, Nationalities and Peoples of Ethiopia, and shall not be subject to sale or to other means of exchange.”

The subsequent provisions, i.e. Articles 40(4) and 40(5) recognize the use rights of peasants and pastoralists over the land that will be allocated to them without payment, and the provisions also state their rights against eviction from their possession. Although the Constitution stipulates that rural and urban land is owned by “the State” and “the peoples of Ethiopia”, Proclamation No. 456/2005⁵⁰ states that “government [is] the owner of land.”⁵¹ Moreover, the Proclamation indicates that the rights of individuals and communities are ‘*holding rights*’. The phrase that considers the government as owner of land is inconsistent with Article 40(3) of the FDRE Constitution which vests ownership of [land] ... (not in the government, but) in “the State and in the peoples of Ethiopia.”⁵²

The discretion of the government in the reallocation of land is, for example, embodied in Article 5(3) of Proclamation No. 456/2005 which reads “Government being the owner of land, communal rural land holdings can be changed to private holdings as may be necessary.” Indeed, this clearly “shows that the recognition given to communal rural holdings can at any time (when deemed necessary) be withdrawn in favour of private holdings. This raises the issue whether communal holding has a merely partial recognition on a temporary basis.”⁵³

According to Article 40(7) of the Constitution, “Every Ethiopian shall have the right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour and capital .” in the context of rural Ethiopia, this mainly refers to modest houses (usually grass-roofed huts) built on the land, trees planted or crops that have not yet been harvested, and not the farm plots nor the grazing fields. Moreover, property rights on immovables recognized in the Constitution and the holding rights (of peasants⁵⁴ pastoralists⁵⁵ and communities⁵⁶) are subject to expropriation for ‘public purposes’ as stipulated under a constitutional provision which provides the following:

⁵⁰ Rural Land Administration and Land Use Proclamation No. 456/2005.

⁵¹ Proclamation No. 456/2005, Art. 5(3).

⁵² Elias N. Stebek (2011), Conceptual Foundations of Property Rights: Rethinking Rural Open Access in Common-pool Resources in Ethiopia”, *Mizan Law Review*, Vol. 5, No. 1, p. 35.

⁵³ *Ibid*, p. 36.

⁵⁴ Proclamation No. 456/2005, Article 2(7).

⁵⁵ *Ibid*, Art. 2(8).

⁵⁶ *Ibid*, Art. 2(11).

Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.⁵⁷

The key elements of the provision are 'private property', 'public purposes' and 'compensation commensurate to the value of the property'. The provision which allows the expropriation of 'private property' *a fortiori* applies for land holdings (by smallholders, pastoralists and communities) even if the literal reading cited above refers to 'private property'. The difference in this regard relates to whether there is the entitlement to compensation for expropriated land holdings.

Proclamation No. 455/2005⁵⁸ provides the following with regard to the power of the relevant public organs to expropriate landholdings:

A woreda or an urban administration shall, upon payment in advance of compensation in accordance with this Proclamation, have the power to expropriate rural or urban landholdings for public purpose where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.⁵⁹

The controlling elements in this provision, such as '*compensation*' and '*public purpose*' are defined under Article 2 of the Proclamation. *Compensation* is defined as "payment to be made in cash or in kind or in both to a person for his property situated in his expropriated landholding." The compensation thus only envisages the '*property situated in [the] expropriated landholding* and not to the use right that is terminated as a result of the expropriation and that could have been transferred for consideration⁶⁰ or inherited by generations of heirs.^{61 57 58 59 60 61}

⁵⁷ FDRE Constitution, Art. 40(8).

⁵⁸ A Proclamation to Provide for the Expropriation of Land Holdings and Payment of Compensation (Proclamation No. 455/2005).

⁵⁹ Proclamation No. 455/2005, Art. 3(1).

⁶⁰ It is to be noted that peasants and pastoralists not only lose use rights due to expropriation but also lose the benefits that could have accrued from the transfer of their land use rights. Art. 8 of Proc. No. 456/2005 provides the following:

"Peasant farmers, semi-pastoralists and pastoralists who are given holding certificates can lease to other farmers or investors land from their holding of a size sufficient for, the intended development in a manner that shall not displace them, for a period of time to be determined by rural land administration laws of regions based on particular local conditions."

⁶¹ Art. 8(5) of Proclamation No. 456/2005 provides that "Any holder shall have the right to transfer his rural land use right through inheritance to members of his family."

Article 2(5) of Proclamation No. 455/2005 embodies a very wide definition of 'public purposes'. It reads:

'public purpose' means the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.

As Imeru notes, the broad definition of 'public purposes' "opens the way for public authorities to consider any activity as serving the public purpose" and "[t]here is no provision in the Proclamation that requires prior declaration of the existence of public purpose or to provide landholders or other interested third parties to have the opportunity to challenge the existence of public purpose."⁶² In effect, the relevant public authority is empowered to define the intended use of any rural land as "public purpose" as long as it is in conformity with a "development plan" designed to ensure the objectives stated in the provision. The same public authority is entitled to define what constitutes a 'development plan' and also determine the fulfillment of the elements of the provision, i.e.:

- a) whether the plan ensures the interest of 'peoples',
- b) the referent to whom the term 'peoples' applies,
- c) the definition of 'direct' and 'indirect' benefits from the use of the land, and
- d) whether the land transfer facilitates sustainable socio-economic development.

It is thus difficult to assure the effective implementation of the First RAI Principle, i.e., "recognition and respect for existing land and resource rights" in the absence of a stronger legal regime of secure land use rights. Equally indispensable are the institutional framework which can provide effective judicial protection and a normative setting that ensures the registration of (individual and community) landholdings and the demarcation of protected forests and wildlife.

3.5- Principles 2 to 7

The *second principle* of Responsible Agricultural Investment requires that food security be enhanced in the host state. This clearly needs case-by-case monitoring and incremental expansion rather than a rush towards extensive farmland deals with foreign commercial farm investors. The discussion in Section 2 shows the magnitude of the land deals which has reached its current level in a very short period of time. The notion of food security pays particular attention to the scope of access that people have to food rather than the volume

⁶² I. Tamrat, *supra* note 5, p. 11.

of food that is produced which is inaccessible to the poor due to factors such as its shortage in local markets or rising food prices. The 2011 famine in the Horn of Africa and the retarded pace of investment implementation after land acquisition are indeed 'wake up' calls that signal the need for pragmatic, sustainable, holistic and integrated agricultural investment beyond the promises of 'investments' that involve massive land transfers.

The *third principle* of good governance and transparency assumes competence and integrity at federal, regional and local levels (in relation with each project), and this in effect, renders hasty and extensive farmland lease inappropriate. It is commendable that various contracts concluded in Ethiopia with foreign investors have been made accessible. However, the website of the Ministry of Agriculture is expected to enhance the level of transparency and offer all the necessary data and information commensurate with the need to monitor the fulfillment of the social and environmental standards stated in the contracts.

With regard to the *fourth principle* of consultation and participation, the degree of motivation of administrative authorities and investors to consult and persuade evictees is usually contingent upon various factors. These include the regime of land rights that can be invoked by the latter and be secured in courts of law and the magnitude of pressures from non-governmental entities such as social movements, civil societies and the media.

And finally, there is the need to examine and address the normative and institutional opportunities and challenges in the regulation and control of MNEs towards the realization of the *fifth, sixth and seventh principles*, which require responsible agro-enterprise investing, social responsibility and environmental sustainability. These fundamental principles require clearly defined and binding commitments, measurable thresholds, monitoring and schemes of implementation which inevitably go beyond good intentions and formal statements.

3.6- Criticism against RAI

Borras and Franco reject 'tool kits' and Codes of Practice such as RAI that target at land governance, and they suggest the concept of land sovereignty "as a potentially more inclusive and relevant conceptual, political and methodological framework".⁶³ To this end, they offer class analysis and underline the need for careful empirical inquiry.⁶⁴ Boras and Franco argue that "[c]lear land property

⁶³ Saturnino M. Borras Jr. and Jennifer Franco (2010), "Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframing Resistance", ICS Working Paper Series, No. 001, p. 2.

⁶⁴ *Ibid.*

rights (private or otherwise) have certainly not guaranteed win-win outcomes in many of the land deals” and have not “automatically protected the rural poor from various forms of dispossession or ‘adverse incorporation’ into the food-fuel production enclaves.”⁶⁵ They regard the Code of Conduct (CoC) “proposed by the World Bank and others [as] a dangerous diversion” because it “diverts attention away from what is wrong with the economic development model” and “from the key role of land in achieving this model.”⁶⁶ They further state that this proposal “diverts our attention away from coming to terms with how rural poor people’s land rights, interests and concerns can (and must) be protected and advanced into the future.”⁶⁷

Land governance is a view and initiative ‘from above’. Land sovereignty brings the ‘people’ back in. Its starting point is the actually existing land-based social relations ‘from below’, and thus is inherently political and historical in orientation, addressing power relations emanating from the social relations of land-based property and production. Without people’s full control over land, the construction of food sovereignty as an alternative food system and development model will be without any solid foundation. In a way, land sovereignty is the notion of a *‘people’s (counter) enclosure campaign* in the midst of widespread attempts at TNC-driven and state-sponsored enclosures worldwide.⁶⁸

This notion of *land sovereignty* is indeed the antithesis for the difficulties in the applicability of Codes of Conduct such as the RAI principles, because there is the tendency to interpret the principles without regard to the power relations and the relational injustice that permeate the normative and institutional framework. However, the magnitude of its applicability and the level of its influence in policies and legal reforms are yet to be researched and empirically tested.

4. The Need for Carefully Negotiated Contracts in Light of RAI

The terms and conditions in each contract determine “the extent to which international land deals seize opportunities and mitigate risks.”⁶⁹ Well-negotiated terms and conditions take various factors into account including concerns such as the manner in which risks are assessed and mitigated. Examples in this regard are the “business models [that] are used (from plantations to contract farming through to various forms of equity participation by local people), how costs and benefits are shared (including the distribution of

⁶⁵ *Ibid*, pp. 10-11.

⁶⁶ *Ibid*, p. 12.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*, p. 36.

⁶⁹ Cotula (2009), *supra* note 34.

food produced between home and host countries), and who decides on these issues and how.”⁷⁰

... [Governments must ask hard questions about the investor's capacity to deliver on very ambitious projects. Sensible regulation, skillfully negotiated contracts and robust social and environmental impact assessments are key. Host governments must create incentives to promote inclusive business models that integrate rural small-holders and family farms, and ensure the respect of commitments on investment levels, job creation, infrastructure development, public revenues, environmental protection, safeguards in land takings, and other aspects. some recipient countries are themselves food insecure, and robust arrangements must protect local food security, particularly in times of food crisis.⁷¹

4.1- Corporate reputation for social and environmental responsibility

The challenge in contracts of extensive agricultural investments “lies in promoting sustainable and responsible FDI” that allows “investors to enjoy a reasonable profit while also ensuring that all investment inflows benefit host populations.”⁷² The Principles of Responsible Agricultural Investment aim at facilitating such a balance. However, “the future success of the Principles will depend more on the support of states and international organizations than on a declaration of good intentions.”⁷³ As Perone states, “[i]t is frequently noted that international investment agreements lack obligations on the part of the investor, instead focusing mainly on the protection of MNEs and facilitating their operations.” This imbalance in the protection of mutual interests is usually addressed through voluntary guidelines and codes of conduct which, according to Perone, “constitute a deficient counterbalance because they are not legally binding and thus cannot be enforced.”

The main motivation of foreign investors towards adherence to such Principles “is the improvement of their corporate reputation, as they show their social and environmental commitment to the international community, consumers and their own employees.”⁷⁴ A precaution that host states (that aspire to attract foreign investors in responsible agricultural investment) should take is thus to make sure that the investors have the reputation and the goodwill

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Nicolas Marcelo Perrone (2011), “Responsible agricultural investment: is there a significant role for the law to promote sustainability?”, *Columbia FDI Perspectives*, No. 38 May 23, 2011.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

which they aspire to maintain and enhance. This is what distinguishes responsible FDI from speculative acquisitions whose primary target is optimal profit mainly from extractive economic activities (including commercial farming) with minimal levels of social and environmental compliance. Such acquisitions purely target at optimal short-term profits and pay minimal attention to the sustainability of production after the lease period and the ecosystem. Some might even fail to start the investment project after having sold the trees that are ‘cleared’ in the name of ‘earthwork’.

The first *caveat* that needs attention is thus to examine the track record of the investor in light of its capacity and corporate responsibility to meet its promises. This is because ‘*good faith*’ is the cornerstone in the interpretation of contracts and the performance of contractual obligations as it is expressly stated in Article 1732 of the Ethiopian Civil Code ⁷⁵ which provides that “Contracts shall be interpreted in accordance with good faith, having regard to the loyalty and confidence which should exist between the parties according to business practice.”

4.2- Elements of fairly negotiated contracts

Carefully negotiated contracts make sure that the promises expressed by foreign investors, i.e. job opportunities, technological transfer, managerial skill transfer, infrastructure, capital investments, socially and environmentally responsible processes of production, waste disposal and marketing, etc. are embedded in the contracts with the necessary level of precision, clarity, measurability and schemes of implementation. “This might include precise local content requirements (employment, inputs) that evolve over project duration to increase local percentages and extend them to higher-value content (e.g. skilled labour).”⁷⁶ Such contracts can also embody provisions on capacity building, safeguards against environmental harm, project revenue sharing and “efforts to improve transparency in contracts and revenue management, including through open tendering and civil society oversight”.⁷⁷ Moreover, the promise that the investments would enhance local food supply should be articulated in the form of obligations to sell a clearly defined percentage of the production in local markets.

Even though fairly negotiated contracts do not envisage new benefits to host countries, they transpose the promises that are expressed into binding obligations. Such formulations can also be informed by various obligations

⁷⁵By virtue of Article 12 of the contracts Ethiopian law governs the implementation of the contracts.

⁷⁶*Ibid.*

⁷⁷*Ibid.*

embodied in laws, instruments and declarations. For example “OECD Guidelines for Multinational Enterprises (the MNE Guidelines) provide recommendations for responsible business conduct in many areas (labour, environment, combating bribery, etc.).”⁷⁸

In a report titled “Land deals in Africa: What is in the Contracts?” Cotula examines twelve land deals and he also analyzes their legal frameworks with the objective of discussing “the contractual issues for which public scrutiny is most needed and to promote informed public debate about them.”⁷⁹

Key issues relate to the contracting process, to economic fairness between investor and host country, to the distribution of risks, costs and benefits within the host country, to the degree of integration of social and environmental concerns, and to the extent to which the balance between economic, social and environmental considerations can evolve over often long contract durations.⁸⁰

As Cotula observes, some of the contracts that are covered in his study “are short, unspecific documents that grant enforceable, long-term and largely transferable rights to extensive areas of land, and in some cases priority rights over water, in exchange for little public revenue and apparently vague and potentially unenforceable promises of investment and/or jobs.”⁸¹ He further notes that the safeguards of local interests are weak in a number of deals and some contracts do not properly address social and environmental issues” as a result of which “there is a substantial risk that local people internalise costs without adequately participating in benefits, and major environmental issues are not properly factored in.”⁸²

Cotula appreciates three contracts from Liberia because of their “more flexible duration, their clearer identification of the land being transacted, their more specific investor commitments on jobs, training, local procurement and local processing, their greater attention to local food security, and their tighter social and environmental safeguards.”⁸³ These contracts “have been ratified by parliament and are available online.” The factors that he observes in the good practices of fairly negotiated contracts in Liberia are “determined political

⁷⁸ OECD, Freedom of Investment Process, Responsible Investment in Agriculture, May 2010, p. 5

⁷⁹ Lorenzo Cotula (2011) ““Land deals in Africa: What is in the Contracts?”, International Institute for Environment and Development (IIED), London, p. 1

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*, p. 2.

leadership, a strong government negotiating team, world-class legal assistance, effective use of financial analysis, and simultaneous (re)negotiation”.⁸⁴

Some of the deals reviewed, namely the Liberian contracts and Mali-2, are quite complex and sophisticated. Liberia-1 and -3 are respectively 40 and 56 pages long. On the other hand, Mali-1 is quite short (6 pages) and unspecific - despite the considerable scale of the deal (100,000 hectares). Subsequent contracts would need to be concluded to actually transfer the land, and they may contain more detail. But at that later stage, the host government is under a legal obligation to provide land - so a poor definition of the investor's obligations in the first contract may have implications for what can be achieved through later negotiations ..⁸⁵

4.3- Sample massive land acquisition: Karuturi

The area of land that was allocated by the Gambella Regional State to Karuturi Global Ltd. was 300,000 hectares (i.e. 741,000 acres).⁸⁶ The federal government has taken a commendable measure in reducing the land acquisition to 100,000 hectares, even if this figure still shows a very large farmland acquisition. Article 1.1 of the contract⁸⁷ reads:

The scope of this Lease Agreement is to establish a long-term land lease of rural land for [the] development [of] palm, cereals and pulses farm on the land measuring 100,000 hectares (Itang 42,088 hectares and Jikao 57,912 hectares), located in Gambella Regional State, Nuer Zone, Jikao District and Itang Special District together with the lease certificate serial No. EIA-IP 14584/07 with all rights of easement of amenities, fittings, fixtures, structures, installations, property or other improvements standing thereon, to the company incorporated for the purposes hereinafter mentioned by the lessee in the Federal Democratic Republic of Ethiopia.

Article 4.1 of the contract states that the lessee shall “get additional 200,000 hectares upon accomplishing the 100,000 hectares within two years as specified under Article 4.4” which sets forth timelines for the development of the leased plot of land. The reduction of the land transfer was preceded by some controversy. According to Esayas Kebede, Head of the Agriculture Ministry's Land Investment Support Directorate, “Three hundred thousand hectares is a

⁸⁴ *Ibid.*

⁸⁵ *Ibid*, p. 20.

⁸⁶ Various publications including the tables shown in Appendix II cite this figure (with some explanation about the inconsistency in what was actually allocated and the figures in the regional government's records).

⁸⁷ Land Rent Contractual Agreement Made between Ministry of Agriculture and Rural Development and Karuturi Agro Products PLC, 25 October 2010.

huge area of land. Nobody can manage it,”⁸⁸ He added that “Karuturi should get a rational and manageable plot of land based on its own capacity and our monitoring and evaluation capacity.”⁸⁹ As Esayas stated, “[t]he boundary of Karuturi’s land was not accurately mapped when it was first leased by the Gambella Regional Government in 2009” and he further noted that “[p]art of the reason for the amendment to the concession was to create an 8,000-hectare corridor through Karuturi’s land for a one-million strong migration of white-eared kob, a type of antelope.”⁹⁰ This clearly shows the risks involved in land leases prior to land mapping and clear demarcation of protected forests and wildlife.

A brief look at the date written on the contract, i.e. October 25, 2010 and the response of Karuturi Global by denying the amendment of the contractual terms evokes some doubts about the credibility in Karuturi’s statements. The following were the statements given by two key officials in Karuturi Global’s top management on May 4th 2011:

“We have not received any recent updates on the Karuturi agricultural business in Ethiopia,” said Archit Singh, an analyst at Globe Capital Market Ltd., which has a “strong buy” rating on the company’s stock. “I am not aware of any change in the lease size,” he said by phone from New Delhi yesterday.

Karuturi Chief Executive Officer Sai Ramakrishna Karuturi said reports claiming the government reduced the concession “are completely baseless.” The company is developing 111,700 hectares of agricultural land, while 200,000 hectares “continues to be with us as part of the concession and will be developed in a phased manner”...⁹¹

4.4- Sample eco-tragedy: Verdanta

There are certain natural resources whose value cannot be monetized. For example, the fact that the air we breathe is not a commodity does not render it

⁸⁸ Interview on April 29th 2011, Capital, [in Business Week, May 4, 2011].
<<http://www.businessweek.com/news/2011-05-04/ethiopian-government-slashes-karuturi-global-land-concession.html>> Last visited: 7 July 2011.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* The news further states the following: “The annual movement from Southern Sudan into an area that includes Gambella National Park, which was given a new boundary in March, is [next to Serengeti] the second-largest mammal migration in Africa, Cherie Enawgaw, an ecologist at the Ethiopian Wildlife Conservation Authority, said in a phone interview from Arba Minch in southern Ethiopia on May 2.”

⁹¹ Bloomberg, May 4, 2011, <<http://www.businessweek.com/news/2011-05-04/ethiopian-government-slashes-karuturi-global-land-concession.html>>, Last accessed: 7 August 2011

less valuable than cargoes of diamonds. Likewise, in a country where only a small percentage of its land mass is covered with forests, the allocation of natural forests for commercial farms cannot be justified by the potential benefits and promises that accompany farming because the corresponding risks and cost are apparent. In this regard, the land lease of 3012 hectares in Gambella region, Mezhenger zone has attracted much attention. It involves natural forests that are considered as sacred by the indigenous communities in addition to the significance of the forests as the basis of their livelihood.

A letter⁹² dated 10 December 2010, was sent to the Minister of Agriculture and Rural Development by FDRE's President Girma Woldegiorgis. The letter states that "the administrator of Gumare Kebele in Godere Woreda, Mezhenger

⁹² The letter (translated from Amharic by the author) is dated Tahsas 1, 2003 Eth. Cal. (10 December, 2010), Reference No. .../ 216/2003.

It reads:

To: Your Excellency Ato Tefera Deribew
Minister of Agriculture
Addis Ababa

In a letter dated 9 December 2010, the administrator of Gumare Kebele in Godere Woreda, Mezhenger Zone has requested that the land transfer of 3012 hectares to the Indian company Verdanta Harvests PLC be stopped because it is covered with natural forests; The forest is preserved and protected by Pact Ethiopia and Sustainable Land Management Project. Moreover, the request states that the land transfer has not been approved by forestry professionals from regional to federal levels.

It is to be recalled that a similar request was made by the inhabitants of the woreda and I had notified the Federal Environmental Protection Authority, subsequent to which the Authority had sent a letter, dated 6 May, 2010, Ref. No. 818-4/1124, to the Ministry of Agriculture and Rural Development. The Environmental Authority's letter notes Ethiopia's role in representing Africa in international negotiations and requests that the natural forest be preserved stating that the benefits that we can obtain from carbon trading outweighs the gains from farming it.

I thus recall our recent discussion on such issues. At a time when our Prime Minister is representing Africa in international negotiations [related with climate change], I request that no land that is covered with forests be allocated for farming. I ask your Excellency that forest land be allocated only to persons who would like to develop forests or to the community's participatory development pursuits.

Girma Wolde Giorgis
President, Ethiopian Federal Democratic Republic

Cc. Ato Tamru Anbelo,
Gumari Kebele

Zone has requested that the land transfer of 3012 hectares to the Indian company Verdanta Harvests PLC be stopped because it is covered with natural forests.” The letter also notes that “the land transfer has not been approved by forestry professionals.” The letter further underlines that land covered with forests should not be allocated for farming and that forestland should “be allocated only to persons who would like to develop forests or to the community’s participatory development pursuits”.⁹³ In spite of such efforts from the President and other pertinent offices, the contract with Verdanta Harvests PLC is still in force.

As the table in Section 5 indicates, the 3012 hectares acquired by Verdanta Harvests PLC are leased at an annual lease rate of USD 6.48 per hectare (i.e., a total of about nineteen thousand US dollars). Even if other promises are taken into account, this amount clearly stands far below the risks and cost of displacement of communities and the deforestation of natural forests. This is signals the magnitude of the risk that Ethiopia’s natural forests are in.

5. Profile of Twenty-four Contracts

Fairly negotiated contracts are necessary because “from a legal point of view, a weak contract means that mechanisms to hold the investor to account are ineffective. Conversely, even well negotiated contracts may be poorly implemented and produce disappointing results.”⁹⁴ In contracts that are not fairly and carefully negotiated “the balance of the parties’ rights and obligations” which lawyers refer to as “the ‘economic equilibrium’ of the contract” tends to give investors “enforceable, long-term and largely transferable rights to extensive areas of land, while host country benefits appear to be often limited or ill-defined.”⁹⁵

Twenty four contracts are rendered accessible through the website of the Ministry of Agriculture. Eight of the contracts are with Ethiopian investors and six with Diaspora investors. The land transfers for the eight Ethiopian investors range from 3,000 to 18,516 hectares. The size of the six land transfers to Ethiopian born investors that have foreign nationality ranges from 431 to 5,000 hectares. It is to be noted that the list only shows the contracts that are made available at the Ministry’s website and it is not an exhaustive list of all the land transfers that are made to date. Ten out of the twenty four contracts are concluded with foreign investors. The total area stated in the contracts with foreign investors is 285,012 hectares while the contracts with Ethiopian investors and diaspora investors indicate total land transfers of 48,519 and

⁹³ *Ibid.*

⁹⁴ Cotula (2011), *supra* note 79, p. 10.

⁹⁵ *Ibid*, p. 20.

16,568 hectares respectively. The following table shows the profile of the ten contracts made with foreign investors:

Lessee	Nationality	Date of the contract	Area of land in hectares	Annual lease rate per hectare		Years ⁹⁶	Region
				Birr ⁹⁷	US D		
BHO Bio Products PLC	Indian	11 May 2010	27,000	111	6.48	25	Gambella
CLC (Spentex)	Indian	26 Dec. 2009	25,000	665.85	38.9	50	B/Gum.& Amhara
Hunan Dafegyuan Agr. Co.	China	25 Nov. 2010	25,000	158	9.22	40	Gambella
Karuturi Agr. Products Plc ⁹⁸	Indian	25 Oct. 2010	100,000	20	1.16	50	Gambella
Rucci Agri PLC	Indian	5 Apr 2010	25,000	111	6.48	25	Gambella
Sannati Agro Farm Ent.	Indian	1 Oct. 2010	10,000	158	9.22	25	Gambella
Saudi Star Agri. Devpt ⁹⁹	Saudi	25 Oct 2010	10,000	30	1.75	50	Gambella
SP and Energy Solutions	Indian	1 Mar. 2010	50,000	143.4	8.37	50	Benishangul
Verdanta Harvests PLC	Indian	20 Apr 2010	3,012	111	6.48	50	Gambella
whitefield Cotton Farm Plc	Indian	01 Jul 2010	10,000	158	9.22	25	SNNPR ¹⁰⁰
			285,012				

The English version of each contract is nine pages long and the contracts have an almost identical content with minor variation regarding the identity of the

⁹⁶ The period of lease “can be renewed for another additional years” based on the mutual agreement between the parties .

⁹⁷ Art. 2.2.4 of the lease contracts allows the lessor “to revise the lease payment rate as the need may arise”.

⁹⁸ Article 19 of the contract states that this contract replaces the earlier contract made with the regional government on 4 August 2008.

⁹⁹ Article 19 states that this contract replaces the earlier contract made with the regional government on 29 September 2009.

¹⁰⁰ Southern Nations, Nationalities and Peoples Regional State.

lessee, the location of the land, lease rent, etc. On the positive front, this shows that the terms and conditions are possibly designed in the host state. However, lack of some diversity and particularity depending upon the location of the land, variation in the social and environmental setting, the duration and area involved, purpose of the farm, etc. indicate inadequate scrutiny and the absence of detailed negotiation on a case-by-case basis.¹⁰¹ The model contract that is used has a preamble and 19 (or 20) articles. The titles and core themes of the provisions below give a general profile of the contracts:

Articles 1 & 2: The provisions deal with the *scope of agreement*, i.e., the area and location of the land and the “period of the land lease and payment rule of the land lease.”

Article 3- *Rights of the lessee*: The issues addressed include the rights of the lessee to develop the land, build infrastructure, use water from rivers and ground water for irrigation, administer the land personally or through agency, use mechanization that the lessee deems fit, and terminate the contract with at least six months of prior notice.

Article 4- *Obligations of the lessee*: The lessee’s obligations to take good care of the land, and to observe the timelines for taking over and developing the land as stated in the provision, conditions of transfer and other obligations.

Article 5- *Rights of the lessor*: This provision embodies the lessor’s right to monitor and establish the performance of the lessee’s obligations, restore land that has not been developed according to the timeline agreed upon, termination of the contract under the conditions stated in Article 5.4 with a prior notice of six months, amend land rent as the need may arise.

Article 6- *Obligations of the lessor*: It deals with the issues of handing over vacant possession of the land, provides special investment privileges “such as exemption from taxation and import duties of capital goods and repatriation of capital goods and profits, granted under the investment laws of Ethiopia”, assures the absence of impediments during the lessee’s activities of “clearing the land and using the same,” and ensures that the “lessee shall enjoy peaceful and trouble free possession” and provide adequate security free of cost.

¹⁰¹ Even certain typing errors and spots that seem to need some editing stand uncorrected in the contracts reviewed.

Articles 7-10: Delivery of the land, Contract amendment and renewal, Grounds for contract termination, Consequences of contract termination procedure.

Articles 11- 15: Registration, Governing law, Force majeure, Covenant of peaceful possession, Controlling calendar.

Articles 16-19/20: Annexes to the agreement, Settlement of disputes, Language, Office and notices.

6. Problematic Provisions in the Contracts

The level of mutual benefits, detail, enforceability and clarity of the terms and conditions embodied in the contracts determine the extent to which win-win benefits can be secured in the course of the contract's implementation. The following provisions of the contracts listed in Section 5 seem to be problematic:

a) *Lease rates* per hectare (Art. 2.2.1):

The variation in the lease rates needs clarification as to why the rates in the contracts with Karuturi and Saudi Star are only Birr 20 (USD 1.16) and Birr 30 (USD 1.75). This can be contrasted against the annual lease rates per hectare in the Contract with CLC (Spentex) shown in Section 5 above (i.e. Birr 665.85/ USD 38.9) and with the rates in various countries.¹⁰²

b) *Revision of rates* (Art. 2.2.3):

The provision could have benefited from a list of illustrative factors that can justify revision of rates. Factors such as change in foreign exchange rates, changing conditions in lease rates in other countries, rising prices of the agricultural products, increasing demand for commercial farm land lease, etc. ... are among the factors that can lead to change in the rates.

c) *Infrastructure* (Art. 3.2):

The provision states the *lessee's rights* "to build infrastructure such as dams, water boreholes, power houses, irrigation system, roads, bridges, offices, residential buildings, fuel/power supply stations, outlets/ health hospitals/dispensaries, educational facilities at the *discretion of the lessee* upon consultation and submission of permit request with concerned offices subject to the type and size of the investment project *whenever it deems so appropriate*." (Emphasis added). The italicized phrases (i.e., "the lessee's rights to build infrastructure", "discretion of the lessee" and whenever it deems so appropriate") evoke doubts regarding the level of emphasis given to infrastructure which is one of the benefits of such projects.

¹⁰² The ranges stated in Oakland Institute's Report are: "Sudan: USD 3-20; Mali: USD 6-12; African average: USD 350-800; Brazil/Argentina: USD 5,000-6,000; Germany: USD 22,000," Horne, Oakland Institute, *supra* note 17., p. 29.

d) *The right to use water for irrigation:*

According to Article 3.3 of the contracts, the lessee has the right to use "irrigation water from rivers or ground water respecting present and future environmental and water laws and regulations without any disturbance to the environment with prior permission from responsible federal and regional institutions." It is not clear whether the land rent has taken the water resources into account. Nor is it clear whether the provision has carefully considered the water resource impact of extensive groundwater pumping and/or extensive irrigation from rivers whose flows, in the Ethiopian context, are being adversely affected by poor watershed management.

e) *Administration of farm:*

Article 3.4 embodies the right of the lessee to "[d]evelop or administer the leased land on his own or through a legally delegated person/ agency." The terms 'delegated person' or 'agency' seem to have the potential to be misconstrued. A case in point is the recent news about "MOU" (*Minutes of Understanding*) signed between Karuturi Global and farmers from Punjab. Thus the words 'delegated person' or 'agency' need to be carefully interpreted. Can Karuturi sub-lease its possession in units of 2000, 3000 etc. hectares to Indian farmers in the name of "Minutes of Understanding"? The following news¹⁰³ requires caution:

... If everything goes as planned, the enterprising farmers of Punjab would be seen managing large farms in Ethiopia in near future. Karuturi Global Ltd, the largest rose producer in the world, has acquired about 770,000 acres of land in Ethiopia for cultivation of cereal crops, palm oil plants, sugar cane, etc and is offering work to the farmers of Punjab.

... Paving way for others, Punjab-based farmer Puneet Singh Thind has signed a memorandum of understanding (MoU) with the company as a consultant and would manage about 2,500 acres of land initially.

The words 'consultant', 'managing farms' etc ought to be carefully interpreted and utmost attention need to be made against subleasing pieces

¹⁰³ Punjab farmers to grow multiple crops in Ethiopia, Business Standard, <<http://www.business-standard.com/india/news/punjab-farmers-to-grow-multiple-crops-in-ethiopia/444507/>> Vijay C Roy / New Delhi/ Chandigarh August 2, 2011. Accessed: 7 Aug. 2011.

"Speaking to Business Standard, Puneet Singh Thind said, "I have visited Ethiopia a couple of times and was really keen to start farming there. So I have signed an MoU with the Karuturi Global Ltd. They are going to provide all kind of infrastructural support to me. Very soon, I would float a company for managing the farms. Initially, I would be managing 2,500 acres of land. As far as revenue sharing is concerned, it would be in the ratio of 65:35." Business Standard, *Ibid*.

of land. Such indirect sub-leasing seems to be inconsistent with Sub-Articles 10, 11 and 12 of Article 4 of the contract which embody the requirement that the lessee ought to develop at least 75% of the project before it is (upon the permit of the lessor¹⁰⁴) allowed to transfer the land or properties developed on the land in favour of any other company or individual.”¹⁰⁵ In the absence of prudence on the part of the regulatory authorities, such schemes would *de facto* lead to resettlement projects.

f) *Environmental responsibility:*

Article 4.1 stipulates that the lessee “shall bear the obligation to provide good care and conservation of the leased land and natural resources thereon, with particular obligations to” the following:

- “Conserve tree plantation that have not been cleared for earth works”;
- “Apply appropriate working methods to prevent soil erosion in slopping areas”;
- “Observe and implement the entire provision of legislations providing for natural resource preservation”; and
- “Conduct environmental impact assessment and deliver the report within three months of execution of this agreement.”

The obligations of the lessee stated in this provision need to be supplemented by detailed standards of compliance because terms such as “good care and conservation”, “appropriate working methods” are too general and imprecise. The illustrative standards embodied in the provision also involve policy choices. For example, would a farm be allowed to clear most of the trees in the name of ‘earth works’? What is the sanction against a lessee’s failure to develop the land after having cleared and sold a significant portion of the trees on the land? who owns the standing trees during the period of the lease? is it possible to determine the level of tree conservation and retain the ownership of the trees conserved as a disincentive for the lessee’s inclination towards cutting them and only allow ownership over the trees the lessee has planted?

The timing of impact assessment is also an issue of concern. Proclamation No. 299/2002 envisages impact assessment “prior to issuing an investment permit or a trade or an operating license” ¹⁰⁶ where the project requires environmental impact assessment. As noted by Mellese Damtie and

¹⁰⁴Art. 4(11) of the contract.

¹⁰⁵Art. (4)(1) of the contract.

¹⁰⁶Art. 3(3) of the Environment Impact Assessment Proclamation (Proclamation No. 299/2002).

Mesfin Bayou, Proclamation N° 375/2003 does not include the requirement of Environmental Impact Assessment in effect repealing “Article 22(2) of the Commercial Registration and Business Licensing Proclamation N° 67/1997, which makes presentation of authorization from environmental agencies a requirement for issuance of business license.”¹⁰⁷

In the context of land transfers, the economic activity of farming according to the project document follows immediately after the conclusion of the contract, and whatever is done thereafter by way of ‘environmental impact assessment’ is a *post facto* procedure which does not lead to the cessation of the agricultural activity. Indeed, this renders post-land allocation impact assessment merely justificatory. As Imeru notes:

[I]nvestors have in large part not been required to conduct EIA during the licensing of such investments or prior to the allocation of land. Equally, although the EIA laws and guidelines require conducting a social impact assessment of projects, they have not been set as a requirement for approval of large scale agricultural investment projects. Interviews with experts at both the Federal and Regional levels have also confirmed that EIA and social impact assessment are not a routine requirement for large-scale agricultural investments.”¹⁰⁸

g) *Incentives:*

The incentives stated in Art. 6.2 include the ones embodied in Ethiopia’s investment laws. It is to be noted that ‘safe’ investment stations with far lesser tax and import duty concession schemes attract more Foreign Direct Investment which is socially and environmentally responsible owing to the factors that rank higher than these incentives. These factors, *inter alia*, include the level of political stability, peace and order, human capital, low level of corruption, culture of trust in business relations, labour cost, local market, access to (and relatively low cost of) export markets, efficient and predictable contract enforcements, predictable and stable property regime. The prevalence of these core factors in a given economic system is inversely proportional to the concession in taxes and the ‘*race to the bottom*’ in social and environmental compliance standards.

h) *Peaceful possession :*

Article 6.6 requires the lessor to:

“ensure during the period of lease [that] the lessee shall enjoy peaceful and trouble-free possession of the premises and it shall be provided adequate security, free of cost, for carrying out the entire activities in the

¹⁰⁷ Mellese Damtie and Mesfin Bayou (2008), “Overview of Environmental Impact Assessment in Ethiopia”, *Melca Mahber*, January 2008, p. 25.

¹⁰⁸ I. Tamrat, *supra* note 5, p. 19.

said premises, against any riot, disturbance or any other turbulent time other than force majeure, as and when requested by the Lessee.”

This contractual clause mixes up the function of the lessor (MoA) -which is merely a civil contracting party in this contract- with the function of an organ of criminal justice. Had the lessor been a private land owner, such provision would not have been included. The criminal justice system will inevitably ensure that law and order are respected. The theme addressed in this contractual clause thus mainly falls into criminal law and not contracts. Such guarantees in the domains of contracts are invariably limited to guarantee against dispossession and third party claims.

i) *Registration of the contract:*

Article 11 of the contract provides that the land lease agreement “shall not be subject to registration and approval by a notary office.” It further reads “However, the lessor as a representative and the highest authority of the Federal Democratic Republic of Ethiopia’s government with respect to this lease agreement shall guarantee the validity of this Agreement despite absence of registration. ...”

All entities including the state¹⁰⁹ and its organs¹¹⁰ are juridical persons under Ethiopian law, and are governed by the law in the context of equality before the law. Under Ethiopian law, contracts which, for example, create or assign the right of usufruct in immovables are required to be registered in court or notary.¹¹¹ Contracts concluded with organs of public administration¹¹² have three options of location for registration, i.e. at court, notary or public administration. The provision of the Civil Code that deals with the registration of lease of immovables in general¹¹³ provides that leases “made for a period exceeding five years shall not affect third parties until they are entered in the registers of immovable property at the place where the immovable is situate.” Likewise, Proclamation No. 456/2005¹¹⁴ states the required procedures applicable to rural land lease agreements including registration at the competent authority.

¹⁰⁹ Article 394(1) of the Ethiopian Civil Code stipulates that “The State is regarded by law as a person”.

¹¹⁰ Article 394(2) reads: “As such [the State] can have and exercise, through their organs, all the rights which are vested in them by the administrative laws.”

¹¹¹ Art. 1723(1), Civil Code.

¹¹² Art. 1724, Civil Code.

¹¹³ Art. 2899, Civil Code.

¹¹⁴ Art. 8(3), Federal Democratic Republic of Ethiopia Rural Land Administration and Use Proclamation (Proclamation No. 456/2005).

The issue that can arise is thus whether the 'registration' in the contracts under discussion should necessarily be made at court or notary. Aside from such issues of location of registration, the Ministry of Agriculture cannot, in a contract it concludes with a lessee, waive the legal requirements of registration *per se*. Any guarantee made by the lessor towards the validity of the contract "despite absence of registration" cannot be tenable under the Ethiopian Civil Code which allows the contracting parties to freely determine the object and terms of contract, but "subject to such restrictions and prohibitions as are provided by law."¹¹⁵

7. Issues Not Addressed in the Contracts

Promises that are made by investors and the expectations of host states cannot merely rely on good intentions. Contracts of land transfers are thus expected to articulate the benefits that are expected by the lessor and the lessee and the obligations that are required to be performed by both parties. The following gaps in the contracts show that promises such as job opportunities, food security, seed varieties, benefits to local communities, transparent and monitored financial transactions and putting in place benefit sharing schemes are left to the credibility and discretion of the lessee.

a) *Job opportunities:*

As Cotula notes, "specific provisions [are] contained in the Liberian contracts, which for instance require unskilled positions to be filled by nationals."¹¹⁶ These contracts "establish sliding scales to progressively increase recruitment of nationals in skilled positions over specified timeframes, and explicitly require compliance with national labour law (e.g. Liberia-3)" even if "precise figures for how many skilled and unskilled jobs will be created are not available."¹¹⁷

b) *Food security :*

As Daniel notes "[i]ncreased food supply does not automatically mean increased food security for all" and he states that "[w]hat is important is who produces the food, who has access to the technology and knowledge to produce it, and who has the purchasing power to acquire it."¹¹⁸ He further underlines that "in order to double food supply, we need to redouble efforts

¹¹⁵ Art. 1711, Civil Code.

¹¹⁶ Cotula (2011), *supra* note 79, p. 25.

¹¹⁷ *Ibid*, pp. 25-26.

¹¹⁸ Shepard Daniel (2011), *Land grabbing and potential implications for world food security*, in Sustainable Agricultural Development: Recent Approaches in Resource Management and Environmentally-Balanced Production Enhancement. Behnassi *et al*, Editors (Springer), p. 40.

to modernize agriculture”¹¹⁹ in a manner that raises productivity along with the enhancement of access to food.

The contracts do not embody commitment of the lessee to sell a specific percentage of its production in local markets. In fact, this is left to the capacity of the local consumers to buy the products from the MNEs. In response to a question from *Deutsche Welle* whether there exists a stipulation in the contracts that obliges multinationals [such as Karuturi] to increase local food supply by at least selling part of the product in Ethiopia, the reply from Esayas Kebede, Director of the Agricultural Investment Directorate was the following:

“It’s not our task to take revenue away from investors. ... [W]e want to increase the purchasing power of our people so that they can afford to buy corn from Karuturi. If the investors can get a good price here in this country, they will sell here.”¹²⁰

c) *Royalty to seed varieties:*

One of the aspects in the disempowerment of rural communities is the MNE biopower manifested in spheres such as royalty to seed varieties and the control of the supply, production and marketing value chains. Although the accessibility of improved seeds is stated as one of the benefits of the land transfers, concrete modalities of securing this benefit and the guarantee against biopower in seeds are not addressed in the contracts.

d) *Local content provisions:*

The contracts further lack “local content provisions” that “require the investor to collaborate with local farmers or to procure goods and services from local producers.”¹²¹ In the context of biofuels, for example, Atakilte Beyene indicates the dangers in extensive land transfers for biofuels owing to the high population density and limited land availability in Ethiopia and he notes the positive aspects in contract farming¹²² which enables small-hold farmers to undertake the tasks of the production for biofuels.

Contractual provisions can thus require the collaboration of investors to enter into contract farming with local smallholders with the *caveat* that the

¹¹⁹ *Ibid.*

¹²⁰ <http://www.ethiopiainvestor.com/index.php?option=com_content&task=view&id=2389&Itemid=88>, Last visited 6 September 2011.

¹²¹ *Ibid.*, p. 26. Cotula appreciates Liberian contracts in which “the contracts contain provisions on local procurement which apply to the investors and their subcontractors (e.g. Liberia-2), or requirements for the investor to establish outgrower programmes (e.g. Liberia-1).

¹²² Atakilte Beyene (2011), “Smallholder-led transformation towards biofuel production in Ethiopia”, in Prosper B. Matondi *et al*, editors, *supra* note 44, p. 90.

latter are not handcuffed by top-down value chain and the strings of biopower such as seed royalties. Because most farm products (other than floriculture in particular and horticulture in general) are not perishable, smallholder farmers in contract farming can have fallback market opportunities while at the same time benefitting from the technological spillovers.

e) *Independent audits and financial monitoring schemes:*

The contracts do not address the issues of “independent audits and the government’s oversight of investor’s financial accounts”, that are necessary as “safeguards against ‘transfer pricing’; -the practice whereby the project company’s taxable profits are decreased through input purchases from, or product sales to, related companies at inflated or discounted prices, respectively.”¹²³

f) *Benefit sharing schemes:*

As Imeru observes, “there are no laws, regulations or directives in place that are clearly articulated to ensure benefit-sharing between the investor and the public” and he further notes that the regional contracts that he has examined do not include these schemes.¹²⁴ The contracts examined in this study do not also include such schemes. “Investors are thus under no legal obligation to share the benefits accruing from their investments.”¹²⁵

The safeguards stated above and other schemes on binding commitments are necessary to ensure that the promises that are expressed by investors can be enforceable. One may wonder whether the embodiments of such commitments in contracts can scare away FDI in agriculture. If any foreign investor shies away from such contracts that are fair, clear and specific, it must be a party that does not provide the promises expressed in such investments. Any reluctance or hesitation of socially and environmentally responsible multinational enterprises to invest in a certain location does not emanate from such contractual terms but is caused by their attraction to other destinations that have a relatively better level of performance with regard to the prime factors that attract investment.

Concluding Remarks

There are push factors towards leasing out extensive areas of land under the assumption that they can bring about socio-economic rewards that offset the social and environmental risks involved in the transactions. On the other hand, however, there is the risk of irreversibility of the social and environmental harm.

¹²³ *Ibid*, p. 27.

¹²⁴ I. Tamrat, *supra* note 5, p. 16.

¹²⁵ *Ibid*.

As highlighted under Section 3, laws such as Proclamation No. 455/2005 and No. 456/2005 reduce the scope and security of land use rights of smallholder farmers, pastoralists and communities. In the Ethiopian context, the problem of land-use insecurity emanates from the extensive powers that these proclamations confer upon executive entities that are empowered to dispossess holders and reallocate land to 'investors'. In various African countries, for instance, rural land that is held under customary tenure is exposed to land grabbing, while on the contrary, land under lease-hold is relatively secure because only courts are allowed to give the final decision over the termination of lease holds.¹²⁶ In customary landholdings, however, local chiefs, as indicated in Section 3.2 are at times maneuvered by MNEs towards land deals.

Both individual and community holdings in Ethiopia can be susceptible to land grabbing whose ultimate rewards may not offset the risks and harm. The lessons that can be learnt from the extensive land transfer of 300,000 hectares to Karuturi (Section 4.3) which was later reduced to 100,000 hectares and from the eco-tragedies such as the land transfer made to Verdanta in Mezhenger clearly show the need for:

- a) the mapping and demarcation of natural forests and wild life,
- b) the registration of the holdings of smallholder framers, pastoralists, semi-pastoralist and community holdings in all regions that have not yet done (or finalized) such registration;
- c) the issuance of land-holding certificates, and
- d) restraint from land transfers in all areas where mapping, demarcation, registration and the issuance of land-holding certificates are not yet made or finalized.

In addition to these measures, addressing the problems and gaps in the contracts discussed in Sections 5 to 7, and securing the use rights of smallholder farmers, pastoralists and communities seem to be *sine qua non* conditions to control speculative land grabbing, and meanwhile enhance responsible agricultural investment. Effective solutions beyond such short-term caveats require the amendment of Proclamations 455/2005 and 456/2005 to expressly render the government a *custodian* (and not *owner*) of land with a view to securing the sovereignty of the State, Nations, Nationalities and Peoples over urban and rural land as enshrined in the Constitution,

In the realm of implementation, this presupposes checks and balances in the legislative, judicial and executive functions of the state. The State, in its legislative function, is expected to address the problems in the normative regime of land rights. Secondly, the termination of land use rights should invariably be

¹²⁶ Zambia can be cited as an example.

decided by the State's judicial organ in such a manner that entities entitled to allocate farmland would not perform the dual functions of dispossessing occupants and reallocating land to investors. In the absence of such pragmatism, caution, checks and balances, the use rights of landholders can easily be violated, and the promises made by 'investors' would in essence become mere public relation statements that rather enhance the global rush to land grabs which is drastically different from binding commitments in win-win agricultural investment.

Matondi *et al* recall three core questions raised by other authors¹²⁷ regarding the "starting point for understanding land grabs", namely: "who owns what? Who does what? Who gets what? And what they do with the surplus wealth?"¹²⁸ They further state what Anuradha Mittal adds: "What is grown? For whom? And How?"¹²⁹ There is yet another question that deserves attention, i.e. why do host countries act the way they do?

The core foundation in the rush of Sub-Saharan African countries, including Ethiopia, towards large-scale farmland transfers seems to be related with the concept of 'economic growth' which was, until recently, highly influenced by the GDP, GNP and per capita income paradigm. At present, this paradigm is replaced by another statistical tool kit of HDI (Human Development Index) which again is usually misinterpreted and affiliated with numbers and statistics rather than actual social facts and real *well-being* at grass roots.

The global economic system which seems to be addicted to statistical 'achievements' and bubble figures in the areas that are regarded as elements of HDI and GDP seems to have caused the quest in developing countries (and by extension in administrative and regulatory units within a country) for aspiring towards and reporting steadily rising figures of economic achievements to the detriment of integrated and sustainable development. Needless to say, the achievability and sustenance of development presupposes a pragmatic and incremental progress that synthesizes the economic, social and environmental dimensions of development. Moreover, the rush to copy and paste the values of consumerism, atomistic individualism and the lifestyles of 'modernity' is steadily rising without a proportionate increase in the production and supply side of goods and services, and faster than the demographic transition towards a lower pace in population growth. It is under such settings and in the midst of

¹²⁷ Borras *et al* (2010), "The politics of biofuels, land and agrarian change: editors' introduction), *Journal of Peasant Studies*, 37(4), 575-92.

¹²⁸ Prosper B. Matondi, Kjell Havnevik and Atakilte Beyene, editors' introduction (2011), *Biofuels, land grabbing and food security in Africa* (London/NY: Zed Books) p. 4.

¹²⁹ *Ibid.*

the disequilibrium and the relational injustice in the global economic system that governments in developing countries perform their administrative and regulatory functions.

we can borrow four words (i.e. ruthless, voiceless, rootless and futureless) used by UNDP and A. Kennedy in 2007¹³⁰ to state the features of FDI-dependent growth in the absence of a prudent and effective balance between rewards and risk. FDI-dependence and passive adherence to the dictates of mono-route economic globalization can be '*ruthless*' due to the wide gap it creates between mass poverty and elite affluence. *Secondly*, economic growth can be '*voiceless*' where it undermines rule of law and the freedom of expression in the guise of priority to the economy. *Third*, cultural 'globalization' and the resultant cultural confusion (rather than cosmopolitan cultural synthesis) may accompany foreign-triggered 'growth' thereby rendering the growth '*rootless*' owing to the "cultural decay" it brings about and due to the crisis it entails in the "identity" of the *self* and in the "meaning" of wellbeing, purpose in life and happiness. And *fourthly*, the conception of 'growth' that over-exploits, degrades and depletes "resources needed for future generations" and the ecosystem at large is "*futureless*."

These precautions should not, however be equated with eco-centrism that focuses on ecological systems for their sake, because problems in economic, social and political development and the corresponding mismatch between population explosion and limited resources are in fact the prime sources of threats to the environment in the context of Sub-Saharan Africa. Nor should simplistic aspirations of equating development with statistical growth be allowed to push us towards the risks that accompany land grabs.

The conceptions of economic 'growth' that misinform policies and decisions (such as the current wave of massive land transfers to foreign 'investors') may continue until inevitable lessons are learnt the hard way. Unfortunately, however, such lessons are usually preceded by bitter losses with irreversible opportunity cost and environmental harm. Meanwhile, the bandwagon not only involves the academics and policy makers that are trapped in the macroeconomic prescription of statistical 'growth,' but also an elite of 'beneficiaries' (including some MNEs) that grab the opportunities to speculative land deals. ■

¹³⁰ Cited in Matondi and Mutopo (2011), "Attracting foreign investment in Africa in the context of land grabbing for biofuels and food security", *Ibid*, p. 72.



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